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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)
009554-0306194

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Signature _____

Typed or printed name _____

Application Number	Filed
10/686,815	October 17, 2003

First Named Inventor: Emma A. Durand

Art Unit	Examiner
3643	Kurt C. Rowan

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)
- ☒ attorney or agent of record. Registration number 47,418
- ☐ attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____

Signature

Emily T. Bell
Typed or printed name

703-905-2261
Telephone number

August 5, 2005
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

Attorney Docket: 9554/306194
Client Reference: Dkt. 3 Reg

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re PATENT APPLICATION of: DURAND ET AL.

Confirmation Number: 8788

Application No.: 10/686,815

Group Art Unit: 3643

Filed: October 17, 2003

Examiner: Kurt C. Rowan

Title: SYSTEM FOR TRAPPING FLYING INSECTS AND A METHOD FOR MAKING THE SAME

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Claims 1-42 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Wigton et al. (U.S. Patent No. 6,145,243) in view of Prather (U.S. Patent No. 6,443,434).

Claims 1-31

Applicants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness against claims 1-31 because at least two of the features of independent claim 1 and independent claim 26 are not disclosed or suggested by the combination of Wigton et al. and Prather.

First, Applicants respectfully submit that the Examiner has erred in taking the position that Wigton et al. teaches an outflow consisting essentially of ambient air from the surrounding atmosphere with the insect attractant diffused therein. Specifically, the "consisting essentially of" language limits the outflow to ambient air and the diffused insect attractant (and allows the possibility of other possible elements that do not effect the basic and novel characteristics of the invention). The Examiner has erred in determining that "the addition of carbon dioxide does not materially affect the basic and novel characteristics of the claimed invention," referring to the CO_2 in the combustion exhaust of Wigton et al. (Advisory Action mailed June 28, 2005.) As explained in Applicants' Amendment After Final dated June 3, 2005 on page 11, first paragraph, the addition of carbon dioxide in a combustion gas does materially affect the basic and novel characteristics of the claimed invention. By using the language "consisting essentially of ambient air from the surrounding

atmosphere with the insect attractant diffused therein" in independent claims 1 and 26, Applicants have specifically claimed a device that uses ambient air and an insect attractant, unlike the device of Wigton et al. that exhausts gas from a combustion operation.

Second, Applicants respectfully submit that the Examiner has erred in taking the position that both Wigton et al. and Prather teach an attractant receptacle that is positioned such that the outflow flows through the receptacle for exposure to the insect attractant. As explained in Applicants' Amendment After Final dated June 3, 2005 at pages 11-12, both Wigton et al. and Prather teach the use of an open vial that allows an attractant to evaporate and mix with the surrounding air. The outflow of Wigton et al. and Prather does not flow through the receptacle.

Accordingly, Applicants respectfully submit that the rejection to independent claim 1, and claims 2-25 that depend therefrom, and independent claim 26, and claims 27-31 that depend therefrom, is improper because a *prima facie* case of obviousness has not been established.

Claims 32-42

Applicants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness to reject claims 32-42 because at least one of the features of independent claim 32 is not disclosed or suggested by the combination of Wigton et al. and Prather.

Specifically, the Examiner has erred in taking the position that *In re Stevens*, 101 USPQ 284 (CCPA 1954), supports the premise that it would have been obvious to make the opening of the attractant receptacle adjustable. As explained in Applicants' Amendment After Final dated June 3, 2005 at page 13, MPEP §2144 makes it clear that the facts in a prior legal decision must be sufficiently similar for the Examiner to use the rationale used by the court. Because the facts of *In re Stevens* are not sufficiently similar for the Examiner to use the rationale used by the court, the Examiner's reliance on *In re Stevens* is misplaced. Specifically, in *In re Stevens*, the court stated that the adjustability "where needed" may not be "a patentable advance." There is no evidence in the record suggesting a "need" for adjustability. Further, in *In re Stevens*, the Examiner had actually cited prior art references teaching structures for adjustability. Here, the Examiner has not cited a single piece of prior art teaching adjustability of the receptacle opening in the claimed context. Thus, all that the Examiner has relied upon is a case that is not on point, and has not cited any prior art teaching the claimed adjustability.

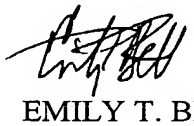
Accordingly, Applicants respectfully submit that the rejection to claim 32 and claims 33-42 that depend therefrom is improper because a *prima facie* case of obviousness has not been established.

Conclusion

For all of the reasons in the record and reiterated above, Applicants respectfully submit that the rejection of claim 1-42 under 35 U.S.C. § 103(a) as being unpatentable over Wigton et al. in view of Prather is improper, and respectfully request that claims 1-42 be allowed.

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP



EMILY T. BELL
Reg. No. 47,418
Tel. No. 703.905.2261
Fax No. 703.905.2500

Date: August 5, 2005
P.O. Box 10500
McLean, VA 22102
703.905.2000